Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

No. 78-266

SYUFY ENTERPRISES, a partnership, successor in interest to original plaintiffs, LAS VEGAS DRIVE-IN THEATRE, INC., SMOKE RANCH DRIVE-IN THEATRE, INC., LAS VEGAS THEATRE CORPORATION, and CONFECTION CORPORATION OF LAS VEGAS, INC.,
Petitioner,

vs.

NATIONAL GENERAL THEATRES, INC., ABC INTERMOUNTAIN THEATRE CO., NEVADA THEATRE CORPORATION, SOUTHWEST AMUSEMENT CORPORATION, LUCILLE MARLEAU CRAGIN, d/b/a EL PORTAL THEATRE, and LAS VEGAS CINERAMA THEATRE CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on April 7, 1978, which affirmed a directed verdict by the United States District Court for the District of Nevada.

OPINIONS BELOW

The opinion of the Court of Appeals review of which is sought is reported at 575 F.2d 233 (9th Cir. 1978) and is attached as Appendix A to this petition.

The trial before a jury commenced on April 1, 1975 in the United States District Court for the District of Nevada. After four weeks of trial, and at the close of the plaintiff's case in chief, the defendants moved for a directed verdict. The trial Court took the motion under submission, and, two months later, on June 27, 1975, issued its minute order granting the motion for a directed verdict. Judgment was entered in favor of defendants on August 19, 1975. Plaintiff appealed, but this appeal was dismissed as untimely due to the existence of defendants' pending counterclaim which had not been tried pending the entry of the directed verdict on the complaint. On April 22, 1976 judgment was finally entered on the directed verdict from which plaintiff now appeals. The District Court's judgment was entered without an opinion and is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 7, 1978. A timely petition for rehearing was filed April 21, 1978 and denied on May 18, 1978. (Appendix B to this petition). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with nations, is declared to be illegal . . ."

QUESTIONS PRESENTED FOR REVIEW

1. Whether evidence of defendants' agreement not to deal with plaintiff, evidence of defendants' meetings at which defendants discussed plaintiff's entry into the market, evidence of defendants' purposeful parallel conduct in refusing to deal with plaintiff and evidence that defendants' group refusal to deal was not motivated by better business judgment was sufficient evidence from which a jury could have found that defendants conspired to boycott plaintiff in violation of Section 1 of the Sherman Act.

2. Whether the Court below violated the Seventh Amendment to the Constitution of the United States and contravened this Court's opinion in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944) by judging the credibility of witnesses upon an appeal from a directed verdict and by finding material facts directly contrary to the evidence.

3. Whether the Court below erred in directing a verdict in favor of defendants in light of this Court's opinion in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

STATEMENT OF THE CASE

A. THE NATURE OF THE CASE

This is a private antitrust suit brought by petitioner against respondents under Section 4 of the Clayton Act (15 U.S.C. § 15) to secure damages for violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

Petitioner Syufy Enterprises (hereinafter "Syufy") is engaged in the business of exhibiting feature length motion pictures in theatres throughout parts of California, Nevada and Arizona. In the Las Vegas metropolitan area, Syufy operates two drive-in theatres, the Las Vegas Drive-In No. 1 and the Las Vegas Drive-In No. 2.

The defendants in this action are National General Theatres, Inc. ("National General"), ABC Intermountain Theatre Company ("ABC"), Southwest Amusement Corporation ("SAC"), Las Vegas Cinerama Theatre Company ("Cinerama"), and Lucille Marleau Cragin ("Cragin"). Nevada Theatre Corporation ("NTC") was dismissed prior to the trial. During the relevant time period, all the defendants except SAC operated motion picture theatres in Las Vegas.

The principal charge in this case is that the named motion picture exhibitor defendants combined and agreed among themselves not to exhibit films on a first-run[1] day and date[2] basis with Syufy's drive-in

[1]A run is simply the continuous exhibition of a motion picture at a theatre. A first-run motion picture is a motion picture which is exhibited for the first time at a theatre in a particular market area. A subsequent-run motion picture is a picture which has already been exhibited in a particular market area at least one time.

[2]Motion pictures are exhibited on either an exclusive or a day and date basis. An exclusive exhibition of a motion picture means that only one theatre in a particular market area may exhibit the picture during a given run. A picture which is exhibited on a non-exclusive, or day and date, basis is one which may be exhibited simultaneously at several theatres in a particular market area.

theatres in Las Vegas and thereby have restrained trade in interstate commerce in violation of Section 1 of the Sherman Act. As a result of this combination to boycott Syufy, petitioner has suffered substantial losses.

B. MATERIAL FACTS

1. Background of the Las Vegas Market

Syufy entered the Las Vegas motion picture exhibition market in January of 1966. At that time Syufy commenced operation of its Las Vegas Drive-In No. 1. At that same time in Las Vegas there existed the El Portal theatre (owned by Cragin), the Guild, Huntridge and Fremont theatres (owned by NTC), the Fox Charleston theatre (owned by National General), and the Cinerama theatre (owned by Cinerama). Each of these theatres was a conventional "hard-top"[3] theatre.

Prior to 1966, from 1951 to 1965, defendants Cragin and NTC had participated in a split of motion picture

[3]"Hard-top is a term used in the motion picture exhibition industry which refers to the more conventional, enclosed theatre house. A hard-top theatre is to be distinguished from a drive-in theatre which exhibits motion pictures on an outdoor screen to patrons seated in automobiles.

product in Las Vegas.[4] Since Cragin and NTC were the only theatre operators in the Las Vegas market area playing first-run films at the time, they divided between themselves, pursuant to their agreement, the first-run films that the distributors offered for exhibition. (R. 215; T. 104-106, 114).[5] This split ended in 1965 when National General entered the market and began bidding for pictures. (R. 215-216; T. 206-207; 120). In 1967, however, these split meetings were revived. This time National General joined NTC and Cragin in the split agreement with the purpose of "eliminating bidding against one another." (T. 296, 125, 128). At that time, the only exhibitor actively bidding for first run product in Las Vegas was Syufy, who had entered the market in 1966 with his drive-in. (T. 140-141; 154; 162-163).

When Syufy entered the Las Vegas market in 1966, it requested the right to exhibit film at the Syufy drive-in theatres on a first-run, day and date basis with the defendants' hardtop theatres. (EX. 14-25). In 1968, the distributors, prodded by Syufy's requests, began to offer their films for exhibition in Las Vegas on an "either/or" basis, that is, they were willing to sell their film to exhibitors either on a

[4]A split of motion picture product is an agreement among motion picture exhibitors in a particular market area not to compete among each other for the purchase of motion pictures from distributors. By the terms of such a split agreement, each participant is assigned a particular motion picture on which he is to bid. That participant promises that he will attempt to purchase that film only and no other. In return, he is assured that no split partners will compete with him in the purchase of that film.

[5]"R" refers to the Record on Appeal; "T" refers to the Reporter's Transcript; and "EX" refers to Trial Exhibits.

first-run exclusive or a first-run, day and date basis. (T. 266-271; 465). Any day and date run was to include a conventional and a drive-in theatre. (T. 267-268). Effectively, the distributors were giving the conventional motion picture theatre exhibitors the opportunity to play first-run, day and date with a drive-in if they chose to do so. (T. 271). In this manner, although a drive-in theatre might submit a bid to play a particular motion picture day and date, this bid could not be accepted by the distributor unless a hard-top theatre offered a day and date bid as well. (T. 272; 274-75).

But although Syufy requested it (T. 880) and although day and date exhibition of first-run motion pictures was a common method of film distribution in other areas (T. 230-232), during the period 1968-71 no hard-top ever played day and date with a Syufy drive-in on any first-run motion picture (T. 1271; 233-34; 248; 275).

2. Evidence of Defendants' Agreement Not to Deal with Syufy

Raymond Syufy, general partner of petitioner Syufy Enterprises, testified at trial about his competitors' concerted response to his entry into the Las Vegas motion picture market in 1966. Not only did each defendant refuse to play first-run, day and date with the Syufy Las Vegas Drive-In, but they warned that it was no use to even request day and date exhibition because defendants had agreed among themselves not to play day and date with a drive-in. This admission was made to Mr. Syufy, in varying forms, by Lloyd

Katz, a representative of defendant NTC (T. 945-46; 952:53; 950); by Horst Schmidt, general manager of defendant Cragin (T. 955-58); and by Dan Polier and Ralph Adams, chief film buyers for defendant National General (T. 959-60; 963).[6]

Also, an independent witness, Emmett Shane, former film buyer for defendant National General, testified that his superior at National General, Ralph Adams, had told him not to worry about the theatres in Las Vegas because "they had an agreement, an understanding, . . . that no one would go day and date with the drive-in in Las Vegas." (T. 780).

In addition to this direct evidence, other evidence of defendants' meetings was presented which shows that defendants had the opportunity to agree to refuse to deal with Syufy. During the years 1951-1965 defendants Cragin and NTC attended split meetings at which these two competitors would divide the motion pictures released for first run exhibition in Las Vegas. By this arrangement Cragin and NTC would not have to bid against each other for films. In 1967 through 1969, National General joined NTC and

[6]As an example of the defendants' admissions, Syufy testified to the following conversation with Lloyd Katz:

"A. He asked me why I had come in. I told him that I came in to operate a first-run drive-in on a day and date basis, that I was going to play with the indoor theatres like I had been doing in San Francisco.

"Well, he told me there was not a chance, that I was going to go broke in Las Vegas, that he and the other theatre, the El Portal, had an agreement that they would not play with a drive-in theatre. And that was about the end of it, that conversation."

(T. 945).

Cragin in the split agreement. And again in 1971 the split meetings were resumed.

Lloyd Katz of defendant NTC admitted that upon occasion the participants of the split would meet and discuss Syufy and the ramifications of Syufy's requested first-run, day and date exhibition. Katz revealed that discussion of Syufy's desire to play day and date was an "alert" to the participants of the split. Each split member was made aware that he must "protect and preserve" the product that had been split to him. (T. 296-299). Katz further admitted that an "independent" refusal to deal with Syufy on a first-run, day and date basis was necessary if defendants were to maintain the integrity of their split arrangements. (T. 299).

Horst Schmidt, head film buyer for defendant Cragin, revealed that he was aware of a "policy" among the exhibitors not to play first-run, day and date. This "policy" to which the exhibitors agreed was communicated by what Schmidt called "shop talk" at the split meeting. (T. 288). Each participant in the split ring knew the other was adhering to this same "policy". (T. 890).

Further evidence which raises the inference that these defendants combined to preclude Syufy from the first-run, day and date market in Las Vegas is the fact that not once during the four year damage period did any one of the defendants so much as offer to play day and date with Syufy, even though first-run films were being offered by distributors on a day and date basis in Las Vegas (T. 266-67; 2148); even though it

would have been more profitable for the defendants to have exhibited their film on a day and date basis;[7] (T. 1301; 1423; 2162; and even though day and date exhibition was more the rule that the exception in other motion picture exhibition markets in the West (T. 230-32; 1053). This parallel course of conduct, adamantly maintained against defendants' own economic interest even in the face of market conditions which would ordinarily dictate a day and date run, raises a question of fact as to whether an actual agreement existed among competitors to boycott Syufy.

REASONS FOR GRANTING THE WRIT

A. CONFLICT WITH THE DECISIONS OF THIS COURT

The rulings below undermine decisions by this Court regarding the role of the jury and the amount of evidence necessary in proving the existence of a conspiracy in an antitrust case. Furthermore, by purposefully ignoring the function of the jury, the courts below have effectively emasculated this Court's express policy of vigorous enforcement of the federal antitrust laws through private civil damage suits.

This Court has consistently recognized the difficulty faced by antitrust plaintiffs in attempting to prove the existence of a conspiracy. Numerous cases decided by this Court have mandated lower courts to be more

[7]For example, defendant Cragin, which had been losing money, experienced an increase in revenues and a leveling off of losses when it began to play day and date with Syufy in Las Vegas in 1974. (T. 302).

liberal in allowing plaintiffs to utilize circumstantial evidence. Moreover, this Court has condemned the use of summary procedures to invade the province of the jury in antitrust cases. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939); *Poller v. Columbia Broadcasting System,* 368 U.S. 464 (1962); *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1972).

In this case, as in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.* and *Continental Ore Co. v. Union Carbide & Carbon Corp.,* the existence and purpose of defendants' conspiratorial conduct were ". . . material issues of fact which could only be resolved by the jury after a plenary trial." *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700, 703-704 (1969).

As described in the Statement of the Case, there was clear and direct evidence (1) that the defendants all refused to bid for films on a day and date basis notwithstanding the fact that the distributors made day and date exhibitions available to them, (2) that the defendants met and discussed Syufy and the potential effect of his entry into their market, (3) that certain defendants admitted that there was an agreement among defendants not to play day and date with Syufy, (4) that certain defendants admitted that Syufy's entry into this market and the prospect of any bidding on a day and date basis would destroy defendants' lucrative split agreements maintained at the expense of the distributors, and (5) that, notwith-

standing defendants' position, day and date bidding was a common method of film exhibition in markets other than Las Vegas. This evidence, given the decisions in *Theatre Enterprises* and *Continental Ore,* should be recognized as more than enough to create a question of fact for the jury as to whether defendants' conduct was the result of independent decision, or conspiracy, tacit or express.

B. THE COURT OF APPEALS HAS FOUND FACTS OPPOSITE TO THE EVIDENCE IN THE RECORD

In the opinion below, while reviewing the evidence, the Court of Appeals mistakenly held that "appellant (Syufy) offered *no* evidence that films were available on a day/date basis." (Appendix A, page viii; emphasis added). It therefore reasoned that defendants could not have conspired to refuse to bid on day and date exhibitions since that manner of exhibition was not available to them. Both this finding and the conclusion drawn from it are plainly wrong and clearly contrary to the evidence.

Day and date exhibition *was* available to defendants. Mr. Lloyd Katz, general manager of NTC, a defendant that settled before trial, testified that the distributors offered exhibitors the choice of bidding for film on either an exclusive *or* day and date basis.

> "Q. But as I understand it, around 1968, distributors started to offer a class of pictures on an either/or basis, which means either one theatre plays it exclusively or we will accept a situation in which two theatres, the hardtop and a drive-in play it simultaneously?
>
> "A. *That's correct.*" (T. 271).
>
> * * *
>
> "A. *The distributor is saying people in the area, if they want to play day and date, we're going to give them the opportunity to do so.*" (T. 271).
>
> * * *
>
> "Q. All right. *Now, there came a time, did there not, when the distributors started offering pictures differently than they had before in Las Vegas, true?*
>
> "A. Yes.
>
> "Q. (By Mr. Salomon) Would you explain the difference in the offers?
>
> "A. *More films were offered either way, either exclusive or day and date.*
>
> "The Court: When was this, sir?
>
> "The Witness: *This would have been some time prior to 1968.*
>
> "Q. (By Mr. Salomon) And some time subsequent to 1966?
>
> "A. Yes.
>
> "Q. Now, please explain this new kind of bid solicitation on the part of the distributors to the jury, this either/or situation?
>
> "A. *The distributor on certain films which he felt were compatible to this type of distribution,* and I will explain that, if I may, with counsel's approval?——
>
> "Q. Yes.
>
> "A. ——*offered his films on a bidding basis to the competing exhibitors on either of those bases,* either on an exclusive run basis, meaning that

whatever theatre was awarded the film would play it in this geographical area exclusively, have it all to himself, and the alternate was, on what we call a day and date basis, and, as I recall, the bid solicitation specified not to exceed one conventional and drive-in as opposed to two conventionals. *So what we were saying is, the exhibitor had the option of bidding on the film on either an exclusive basis or day and date to play with a drive-in.*" (T. 266-268).

The Court of Appeals chose to ignore this evidence and formally found the opposite.

The Court below also chose to ignore evidence of agreement and conspiracy among defendants, finding instead that there was "*no* evidence to show that appellees (defendants) had conspired to refuse to bid day/date to the detriment of appellant." (Appendix A, p. v; emphasis added). Again the Court is plainly wrong as the direct testimony of Messrs. Syufy and Shane (along with the other evidence set forth above in the Statement of the Case) clearly demonstrates.

From 1966 through 1969 Emmett Shane was the head booker for defendant National General. As booker, Shane would bid for motion pictures on behalf of National General in the Las Vegas area. (T. 765). He also attended the split meetings held in 1968 and 1969. (T. 782). Shane's immediate superior was Ralph Adams, head film buyer for National General Corporation. (T. 764). With respect to Las Vegas and the attempts made by Syufy to play day and

date, Shane testified to the following conversations had with Adams:

"Q. (By Mr. Salomon) Did you express any concern to Mr. Adams concerning Mr. Syufy's attempts to play on a day and date basis?

"A. His statement to me was no one was going to play day and date with Syufy in Las Vegas, that a decision had been made not to play day and date with the drive-in." (T. 771).

* * *

"A. Mr. Adams told me not to worry about the three 20th Century Fox motion pictures, that Fox wanted to go day and date on them in Las Vegas—not to worry about it because no one was going to play day and date on these three pictures.

"Q. (By Mr. Salomon) Did you say anything in response to that to Mr. Adams?

"A. I was concerned because this was a period in the split where we were experiencing some difficulty, and I was concerned that maybe there's always—maybe a split is going to blow up and someone would go day and date on one or two or three of these pictures.

"But he assured me that they had an agreement, an understanding, which was the substance of what he said, that no one would go day and date with the drive-in in Las Vegas." (T. 780).

Raymond Syufy, general partner of Syufy Enterprises, also testified that he had had conversations with various of the defendants at which defendants' agreement not to play day and date was mentioned. Syufy testified to one such conversation with Lloyd Katz in 1968 as follows:

"A. Well, we asked Katz again to play day and date with us, play his indoor theatre with our drive-in, explained to him that there were two separate markets. And I felt that the people should have a choice to decide where they wanted to go, whether the drive-in or the indoor. And he said they had an agreement with the indoor operators not to play with the drive-in theatre. And that I'd never get day and date in Las Vegas. In fact, the conversation came up where he wanted to buy my drive-ins out or try and work a deal out, and I wasn't interested." (T. 950).

In other conversations with Katz, Katz advised Syufy that Syufy would go broke in Las Vegas because there was an agreement between the exhibitors there not to exhibit film on a first-run, day and date basis with Syufy's drive-in in Las Vegas. (T. 945; 950; 952-53).

Between 1966 and 1970 Syufy initiated three conversations with Horst Schmidt, the general manager of defendant Cragin, in which Syufy sought first-run, day and date exhibition in Las Vegas, and Schmidt advised that he had an agreement with the other exhibitors not to play day and date with a drive-in. (T. 955-958).

Syufy also contacted defendant National General seeking day and date exhibition in Las Vegas. In one conversation in 1966 with Dan Polier, chief film buyer for National General in Las Vegas at the time, Polier told Syufy that he had agreed with other theatre exhibitors in Las Vegas not to play day and date with

a drive-in. (T. 959-960). In subsequent conversations with Ralph Adams, successor to Polier at National General, Adams also told Syufy that National General had agreed with the other Las Vegas exhibitors not to play on a day and date basis. (T. 960; 963).

Given this testimony, it is evident that there *was* in fact evidence from which the jury could have believed that defendants conspired to deprive plaintiff of day and date exhibition. The Court of Appeals may not weigh the credibility of the evidence and thereafter refuse to allow that evidence to be submitted to the jury. To hold the contrary would be to contravene this Court's decision in *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29 (1944). It is simply a denial of this petitioner's constitutional right under the Seventh Amendment for this or any other Court to decide questions of fact and the credibility of witnesses. Petitioner respectfully submits that, under the proper standard of review of a directed verdict, giving the petitioner the full benefit of its evidence and the fair inferences, this Court should and must correct the judgment of the Court of Appeals in this case and permit the petitioner to have its cause properly decided by a jury as is its right.

C. THE COURT OF APPEALS HAS DIRECTLY CONTRAVENED THIS COURT'S OPINION IN THEATRE ENTERPRISES, INC. v. PARAMOUNT FILM DISTRIBUTING CORP.

The opinion of the Court of Appeals is in direct contravention of this Court's opinion in *Theatre En-*

terprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

In the present case, the Court of Appeals acknowledged the evidence of defendants' parallel business conduct by admitting that "it is true that the film exhibitors all refused to bid for films on a day/date basis." (Opinion, p. 6, lines 1-2). The Court nevertheless refused to submit the question of defendants' conspiracy to the jury based upon this evidence of parallel conduct.

In *Theatre Enterprises* this Court held that evidence of parallel business behavior, without more and even in the face of defendants' explanations, while not sufficient to compel the conclusion of conspiracy, *at the very least* created a *question of fact* concerning the existence of a possible conspiracy which should be put to the jury for determination.

The Court of Appeals failed to follow the clearly enunciated principles of *Theatre Enterprises* and this Court should correct this error by allowing petitioner its trial by jury.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

Dated, San Francisco, California,
August 15, 1978.

Respectfully submitted,
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(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
Ninth Circuit

No. 76-2003

Syufy Enterprises, a partnership, successor in interest to original plaintiffs, Las Vegas Drive-In Theatre, Inc., Smoke Ranch Drive-In Theatre, Inc., Las Vegas Theatre Corporation, and Confection Corporation of Las Vegas, Inc.,

Appellant,

vs.

National General Theatres, Inc., ABC Intermountain Theatre Co., Nevada Theatre Corporation, Southwest Amusement Corporation, Lucille Marleau Cragin, d/b/a El Portal Theatre, and Las Vegas Cinerama Theatre Co.,

Appellees.

[Filed Apr. 7, 1973]

Appeal from the United States District Court
District of Nevada

OPINION

Before: KILKENNY and GOODMAN, Circuit Judges, and MURRAY, District Judge.*

*The Honorable William D. Murray, Senior United States District Judge for the District of Montana, sitting by designation.

KILKENNY, Circuit Judge:

Appellant appeals from a directed verdict granted on its antitrust claim against appellees. The district court concluded that the evidence of violation of § 1 of the Sherman Act, 15 U.S.C. § 1, was insufficient. We affirm.

FACTS

This action was filed in federal district court in 1971 alleging violations of §§ 1 and 2[1] of the Sherman Act. In essence, the complaint charged certain Las Vegas theatre owners of conspiring with non-named film distributors to confine the exhibition of first run films to appellees' theatres. In addition, appellees were charged with secretly agreeing to divide first run films among themselves to the exclusion of the appellant. Appellees answered and also counterclaimed alleging that the appellant had engaged in abuse of the litigation process. The trial before a jury commenced in 1975, and at the conclusion of the appellant's case the court granted appellees' motion for a directed verdict. Appellant filed a notice of appeal which was dismissed without prejudice in light of the pending counterclaim. The counterclaim went to trial in 1976, and appellant's motion for mistrial was granted. The counterclaim was then severed from the original complaint allowing for this appeal.

THE LAS VEGAS THEATRE MARKET

Appellant entered the theatre business in Las Vegas in 1966 when it opened the Las Vegas Drive In. Four

[1]The § 2 claim was not pursued.

of the named appellees were operating theatres at that time, the Nevada Theatre Corporation [NTC], National General Theatres [National General], Las Vegas Cinerama [Cinerama], and Cragin. (Hereinafter collectively referred to as exhibitors.) All of these appellees were operating conventional indoor theatres when the appellant opened its drive-in theatre. There were two other drive-ins in Las Vegas in 1966, one operated by National General and the other by a non-party. Another named appellee, ABC Intermountain Theatre Co. [ABC], opened its first Las Vegas theatre in 1970.[2] The record does show that during the 1966-1971 period there was at least one other theatre, The Bonanza, operating in the Las Vegas market.

During the five years preceding this action Las Vegas theatre owners drifted in and out of so called "split agreements." As defined by the district court a split is an arrangement among participating exhibitors in a market area entered into with the knowledge and consent of distributors. The participants therein agree that a member thereof shall have the first right to negotiate with a licensing distributor. A split can be by company or by picture. In a company split, the participating exhibitors agree that a member thereof shall have the right to negotiate for the pictures released by a given company prior to any other members doing so. In a picture split, the participants agree that a member thereof shall have the right to negotiate for a particular picture prior to the other

[2]Appellant introduced no proof as to Southwest Amusement Corporation.

members so doing. From 1951 to 1965 there were only two exhibitors in Las Vegas, and they were parties to a split agreement. During 1966 and 1967 there was no split agreement, and all theatre owners competed freely for films. In 1968 another split agreement was born among National General, Cragin, and NTC. The split dissolved, and for all of 1969 and 1970 the Las Vegas exhibitors again bid without restraint for their films. In 1971 all of the named appellees, as well as the appellant, formed yet another split agreement. Appellant withdrew later that year and filed this claim. At no time was the Bonanza Theatre a party to any split agreement. Appellant does not challenge nor would such a challenge be sustained to the various split agreements. *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 20 (CA9 1971).

In addition to the split agreements, the process of procuring a motion picture for showing in a particular theatre is complicated by the terms of the distributor's contract with the individual exhibitor. Generally, distributors ask for bids on all their films. They can seek bids on at least three sets of terms. First, the distributor can extend bid invitations to an exhibitor on an "exclusive" basis. As the district court found, a picture exhibited on an exclusive basis is shown at only one theatre in any one particular market area. Second, the distributor can offer to bid the film on a "day/date" basis. This would mean that the film would be shown at more than one theatre, either drive-in or conventional, in a given market area at any one time. Third, the distributor could offer the

film to bidders under either plan and then decide which one to accept. This is commonly referred to as "either/or" bidding. The decision on how to offer films for bids and what bids to accept rests solely with the distributor.

The business reasons for the differing types of exhibition contracts are obvious. The day and date allows the theatre owner to submit lower bids for films since they will not have the exclusive showing rights. This is balanced by the fact that the theatres using day and date will be competing for the same customers. The exclusive showing rights afford just the opposite considerations. Exhibitors pay higher film rental rates, but are guaranteed exclusivity. In addition, the distributors will have a greater opportunity to profit from second showings in other theatres if the first run was on an exclusive basis.

The appellant contends that the named appellees agreed not to bid for films on a day/date basis. Consequently, appellant charges that it was forced to bid for all films on an exclusive basis. Appellant claims that it was new to the Las Vegas theatre market, and consequently was unable to offer the sort of past attendance figures to allow it to bid successfully for most exclusive pictures. The district court found that there was no evidence to show that the appellees had conspired to refuse to bid day/date to the detriment of the appellant. We agree.

STANDARD OF REVIEW

Since this matter is before the court from the entry of a directed verdict, our standard of review is quite strict. Our recent opinion in *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (CA9 1976), *cert. denied* 429 U.S. 940, accurately describes our task:

> "Our inquiry, therefore, is not whether there is substantial evidence supporting a finding of independent business purpose, but whether no reasonable jury could have found that Distributor participated in a conspiracy to restrain trade. The burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact, and, in determining whether the burden has been met, we must draw all inferences of fact against the movant and in favor of the party opposing the motion." at 683.

Although this language speaks with respect to a motion for summary judgment, the *Calnetics* court properly expanded it to review of directed verdicts. *See also, Santa Clara Valley Distributing Co. v. Pabst Brewing Co.*, 556 F.2d 942, 944 (CA9 1977).

EXHIBITORS' INVOLVEMENT

Appellant offered two witnesses to prove there was an agreement among Las Vegas theatre owners not to bid day/date for films to be shown in their market. The first witness was one Shane, former head booking agent at National General. His testimony is somewhat ambiguous, but a fair reading does not show the existence of any agreement among the appellees to

refuse to bid day/date with appellant. The other witness offered to prove the conspiracy was the appellant himself. He suggested that several employees of the appellees had told him that they could not bid on a day/date basis for films because of an agreement between the various appellees. The distributors were not mentioned. Again the record is devoid of any substantial proof of an actionable conspiracy. Rather, the testimony of officials of the various exhibitors demonstrates that each theatre had a formal individual policy of bidding for films on an exclusive basis only.

While it is true that the film exhibitors all refused to bid for films on a day/date basis, this mere parallel conduct, in and of itself, does not equate with proof of a conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Dahl, Inc. v. Roy Cooper Co., supra; C-O Two Fire Equipment Co. v. United States*, 197 F.2d 489 (CA9 1952), *cert. denied* 344 U.S. 892. The testimony indicated that there were various independent business reasons for choosing to bid for films on an exclusive only basis. Proof of mere parallel action on this record is insufficient. Furthermore, the testimony shows that the Bonanza theatre, not charged to have been a member of the alleged illegal conspiracy, at all relevant times chose not to bid for films on a day/date basis despite appellant's resquests that it do so. We can only assume that the independent business motivation for offering films on an exclusive basis was behind Bonanza's decision.

DISTRIBUTORS' INVOLVEMENT

It is the distributors' absolute control over film exhibition that fully exposes the fatal flaw in appellant's arguments. As we have noted, the motion picture distributors decide how to offer films to the exhibitors and just what bids to accept, yet they are not defendants nor charged with the conspiracy. Since the exhibitor can only bid for films consistent with the distributors' bid invitation, the appellant must show that films were offered for bids on a day/date basis in the Las Vegas area before it could prove that the appellees had conspired not to bid for the films on a day/date basis. Here appellant offered no evidence that films were available on a day/date basis. In fact, on cross-examination appellant admitted that the large majority of films offered for bids during the 1967-1971 period were available on an exclusive basis only. Manifestly, the appellees could not conspire to refuse to bid on something that was not available to them. *A.L.B. Theatre Corp. v. Loew's Inc.*, 355 F.2d 495 (CA 7 1966).

Moreover, appellant has failed to show that there was anything but an individual decision on the part of each distributor to offer films on an exclusive basis only. While the record does indicate that a distributor's decision on the method of offering its films to exhibitors may be influenced by the exhibitors themselves, there is no evidence to suggest that the appellees in any way dictated distributor policy. A mere refusal by an individual distributor to offer films on a day/date basis without an agreement does not violate

the antitrust laws. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1220 (CA9 1977), and *Dahl, Inc. v. Roy Cooper Co., supra.*

DAMAGES

In the light of the above conclusions, we do not reach the issue of damages.

CONCLUSION

The judgment of the district court must be affirmed.

IT IS SO ORDERED.

Appendix B

United States Court of Appeals
Ninth Circuit

No. 76-2003

Syufy Enterprises, a partnership, successor in interest to original plaintiffs, Las Vegas Drive-In Theatre, Inc., Smoke Ranch Drive-In Theatre, Inc., Las Vegas Theatre Corporation, and Confection Corporation of Las Vegas, Inc.,

Appellant,

vs.

National General Theatres, Inc., ABC Intermountain Theatre Co., Nevada Theatre Corporation, Southwest Amusement Corporation, Lucille Marleau Cragin, d/b/a El Portal Theatre, and Las Vegas Cinerama Theatre Co.,

Appellees.

[Filed May 18, 1978]

Appeal from the United States District Court
District of Nevada

ORDER

Before: KILKENNY and GOODMAN, Circuit Judges, and MURRAY, District Judge.*

*The Honorable William D. Murray, Senior United States District Judge for the District of Montana, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Appendix C

United States District Court
District of Nevada
Civil No. LV 1724-RDF

Las Vegas Drive-In Theatre, Inc., et al.,
Plaintiffs,
vs.
National General Theatres, Inc., et al.,
Defendants.

[Filed Apr. 22, 1976]

JUDGMENT ON DIRECTED VERDICT

This action, having come on for trial before a jury, the Honorable Roger D. Foley, United States District Court for the District of Nevada, presiding, has been disposed as follows. This Court has ordered:

1. The defendants' motion for directed verdict on the complaint has been granted.

2. The plaintiffs' motion to reconsider, filed April 2, 1976, is denied.

3. The counterdefendants' motion made orally for a mistrial on the counterclaim is granted on the grounds stated upon the record.

4. The counterclaim is hereby severed from the complaint in this action.

5. The counterclaim is hereby stayed pending a decision from the Ninth Circuit Court of Appeals

on the appeal which is expected to be taken from this Court's order granting the defendants' motion for a directed verdict on the complaint.

6. The counterclaimants will have fifteen (15) days from the date the mandate from the Court of Appeals on the complaint is spread upon the record of this Court to file and serve an amended counterclaim. The counterdefendants will not be required to file an answer to the amended counterclaim until after a decision has been made on the motion for summary judgment which the counterdefendants are expected to file against the amended counterclaim.

7. The counterdefendants will have thirty (30) days from the date of filing of the amended counterclaim or forty-five (45) days from the date the mandate from the Court of Appeals on the complaint is spread upon the record of this Court to file and serve a motion for summary judgment against the existing counterclaim (if no amendment is filed) or against the amended counterclaim. The counterclaimants will respond to the motion for summary judgment as prescribed under the local rules of this Court.

8. Disposition:

a. If the Court of Appeals should reverse this Court's order granting the directed verdict on the complaint, the case will be retried on the complaint to a new jury.

b. If there is a reversal as in (a) above and, if this Court should deny the counterdefendants' motion for summary judgment against the counterclaim,

the counterclaim will be consolidated with the complaint and tried at the same time to a new jury.

c. If the Court of Appeals should affirm this Court's order granting the directed verdict on the complaint, and should this Court deny the counterdefendants' motion for summary judgment against the counterclaim, the counterclaim will be retried to a new jury.

There being no just reason for delay in entering this judgment in favor of the defendants on the complaint, it is hereby expressly directed, ordered, adjudged and decreed:

That judgment be entered in favor of defendants on the complaint, and that defendants shall be awarded costs.

Dated: April 19, 1976.

Approved As To Form:

/s/ Joseph M. Alioto
Joseph M. Alioto
Attorney for Plaintiffs

/s/ Allan Albala
Allan Albala, Member of Swerdlow, Glikbarg & Shimer, a Professional Corporation.
Attorney for Defendants

/s/ Roger D. Foley
Roger D. Foley
Judge, United States District Court
4/22/76

Appendix D

United States District Court
District of Nevada

No. LV 1724

Las Vegas Drive-In Theatre, Inc., et al.,
Plaintiffs,

vs.

National General Theatres, Inc., et al.,
Defendants.

[Filed Aug. 18, 1975]

REVISED FINDINGS OF FACT AND CONCLUSION OF LAW

In ruling upon Defendants' Motion for a Directed Verdict, the Court has viewed the evidence in the light most favorable to plaintiff, made all inferences which could reasonably be drawn therefrom by a jury of reasonable men, and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Parties and Claims Asserted

1. This action was brought by plaintiffs to recover treble damages and to seek injunctive relief for alleged violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) involving the distribution and exhibition of feature pictures in the Las Vegas metropolitan area of Clark County, Nevada.

2. The original plaintiffs were Las Vegas Drive-In Theatres, Inc., Smoke Ranch Drive-In Theatre, Inc., Las Vegas Theatrical Corporation and Confection Corporation of Las Vegas, Inc. Syufy Enterprises, a partnership, is successor to the four corporations named in the complaint and is the proper party plaintiff.

3. During the relevant time period plaintiff operated two drive-in theatres in the Las Vegas area called the Las Vegas Drive-In No. 1 and the Las Vegas Drive-In No. 2. The Las Vegas Drive-In No. 1 opened for business in January, 1966. The Las Vegas Drive-In No. 2 was built in 1971 on the same location as the Las Vegas Drive-In No. 1, resulting in the creation of a twin drive-in theatre. It opened for business in March, 1971. Incidental to the operation of the drive-in theatres, plaintiff sells snacks, beverages and refreshments to patrons of its theatres.

4. The original defendants in this action were National General Theatres, Inc. (National General), ABC Intermountain Theatre Company (ABC), Nevada Theatre Corporation (NTC), Southwest Amusement Corporation (SWC), Las Vegas Cinerama Theatre Company (Cinerama Theatre), and Lucille Marleau Cragin d/b/a El Portal Theatre (Cragin). Nevada Theatre Corporation was dismissed prior to the trial.

5. The following eleven major distributors of motion pictures in the United States were named in this action as nonparty coconspirators with defendants:

Columbia Pictures Company
Buena Vista Distribution Co., Inc.
Metro Goldwyn Mayer, Inc.
Paramount Pictures Corporation
Universal Film Exchanges, Inc.
Warner Bros. Seven Arts Distribution Corp.
Twentieth Century-Fox Films Corporation
National General Pictures
American International Pictures
United Artists Corporation
Embassy Pictures

6. The period of time for which damages were sought in this case was the four years preceding the filing of the complaint on November 24, 1971. (15 U.S.C. 15(b))

Definitions

7. The definitions applicable to these findings of fact are as follows:

(a) *Conventional or Drive-In*—The term conventional, hardtop and walk-in are synonyms for a theatre into which patrons walk and occupy a seat when viewing a motion picture. Drive-in theatres are theatres into which patrons drive their cars and view the motion picture from the car with the sound being transmitted through an individual speaker.

(b) *First-Run or Subsequent-Run*—A first-run motion picture is a motion picture which is exhibited for the first time at a theatre or theatres in a particular market area. A subsequent-run motion picture is a picture which is exhibited in another

theatre or theatres subsequent to the completion of its first exhibition in that market area. A run is a continuous exhibition of a motion picture at a theatre.

(c) *Exclusive or Day and Date*—Motion pictures are exhibited either on an exclusive or on a nonexclusive basis. If a picture is exhibited on an exclusive basis, only one theatre in a particular market area is exhibiting the picture. On a nonexclusive basis a picture is exhibited "day and date" (simultaneously) at one or more drive-in theatres or one or more walk-in theatres or any combination of either.

(d) *Bidding or Negotiation*—Motion pictures are licensed either by bidding or negotiation. When a distributor licenses a picture on a bid, it first sends out a bid invitation to the exhibitors in a particular area announcing the availability date of the motion picture being released and the deadline for submission of bids. The bid invitation also specifies, among other things, the manner in which the picture will be exhibited, exclusive or nonexclusive. The distributor accepts one or more bids or rejects all bids. If the distributor rejects all bids, he rebids the picture and goes through the same process again or he enters into negotiations with one or more interested exhibitors for the licensing of that motion picture. Negotiations need not follow bidding. A distributor may, rather than send out bid invitations, simply enter into negotiations with one or more exhibitors in a particular market area for the licensing of the motion picture.

(e) *Exclusive or Either/Or*—Just as pictures are exhibited on an exclusive or nonexclusive basis, distributors offer pictures for licensing in the same manner. Thus, a distributor offers to license pictures only on an exclusive basis; only on a day and date basis; or on an either/or basis, giving exhibitors a choice to make an offer to license the picture exclusive or on a day and date basis. The distributor decides which of the offers to accept.

(f) *Split of Product*—A split of product (motion pictures) basically is an arrangement among participating exhibitors in a market area entered into with the knowledge and consent of distributors. The participants therein agree that a member thereof shall have the first right to negotiate with a licensing distributor. If such exhibitor is not able to agree upon terms with the distributor, then the other exhibitors in the split of product arrangement attempt to license that particular motion picture. A split of product can be by company or by picture. In a company split, the participating exhibitors agree that a member thereof shall have the right to negotiate for the pictures released by a given company prior to any other members so doing. In a picture split, the participants agree that a member thereof shall have the right to negotiate for a particular picture prior to the other members so doing.

History of Motion Picture Exhibition in Las Vegas

8. Prior to 1965 there were two exhibitors of first-run pictures in the Las Vegas market, Nevada Theatre Corporation and Lucille M. Cragin. NTC

owned and operated the Guild, Huntridge and Fremont,[1] all walk-in theatres. Cragin owned the El Portal theatre, a walk-in. These two exhibitors never owned theatres outside of Las Vegas.

9. During the period 1951 to 1965 there was a split of product arrangement between NTC and Cragin. This split of product arrangement was by company. During its existence both Cragin and NTC exhibited films on an exclusive basis only at their theatres.

10. National General entered the Las Vegas market by acquiring the Nevada Drive-In Theatre prior to March 1965 and opening the Fox Charleston Walk-In Theatre in March 1965. The split of product arrangement between Cragin and NTC ended sometime in 1965. The Nevada Drive-In Theatre failed to establish itself as a first-run motion picture theatre on an exclusive basis and thereafter exhibited subsequent-run motion pictures on an exclusive basis. The Fox Charleston Walk-In Theatre established itself as a first-run motion picture theatre on an exclusive basis in the Las Vegas market.

11. In 1965 another exhibitor entered the Las Vegas market. Cinerama Theatre constructed a theatre to exhibit "road show" or "hard ticket" pictures on long engagements for which patrons bought tickets in advance on a reserved-seat basis for designated performances at premium prices. This was the only theatre operated by it in the Las Vegas market during the complaint period. For the duration of this

[1]The Fremont was torn down in 1974.

road show or hard ticket policy Cinerama Theatre did not compete with other theatres in the Las Vegas market for the licensing of motion pictures.

12. In 1966 plaintiff opened the Las Vegas Drive-In Theatre. From the theatre's inception plaintiff requested first-run pictures for exhibition at its drive-in theatre on a day and date basis only with one walk-in theatre in the Las Vegas market. At that time, in addition to the Nevada Drive-In, the other drive-ins in the Las Vegas market were the Skyway and the Sunset, each of which was playing subsequent run.[2] To acquire the drive-in run of first-run motion pictures on a day and date basis with one walk-in, plaintiff requested bidding against the other drive-in theatres in the Las Vegas market. To acquire films on an exclusive basis, plaintiff bid against all walk-in and drive-in theatres in the Las Vegas market. There was no evidence that in the Las Vegas market during the complaint period any distributor offered to license its motion pictures on a day and date basis only to one drive-in and one walk-in theatre.

13. In 1966 and 1967 there was bidding among the exhibitors of first-run motion pictures, including plaintiff, for licenses to exhibit motion pictures in the Las Vegas market. All exhibitors exhibited motion pictures on an exclusive basis. NTC and Cragin continued the first-run exclusive policy they had fol-

[2]These theatres were and are owned by Sero Amusement Corporation, a non-party herein. There was no evidence introduced by plaintiff that these drive-ins played on anything other than an exclusive basis.

lowed since the 1950's. National General's first-run exclusive policy was consistent with its policy in other areas in which it operated theatres, i.e., not to play day and date with any other theatre. Cinerama Theatre continued to exhibit road show pictures not available for day and date exhibition.

14. In August of 1967 the Bonanza Theatre opened in Las Vegas, located adjacent to the Bonanza Hotel. It was operated by the Walter Reade organization in New York, a non-party. This theatre played exclusive first-run pictures with some sub-run pictures. It closed in late 1970 at the time the hotel closed. At no time did plaintiff request the Bonanza Theatre to play day and date with plaintiff's drive-in theatre and at no time did plaintiff offer to play his drive-in theatre day and date with the Bonanza Theatre.

15. In 1968, National General opened a second walk-in theatre in Las Vegas, the Fox Boulevard. In that year a split or product arrangement was entered into among NTC, Cragin and National General with reference to first-run motion pictures in the Las Vegas market. Plaintiff's Las Vegas Drive-In Theatre and the Bonanza Theatre bid against the exhibitors in the split arrangement. There is no evidence that plaintiff at that time requested entry into the arrangement. Nor is there any evidence that plaintiff was refused or would have been refused such entry. The split arrangement remained effective during 1968 and terminated thereafter. During that year plaintiff and the Bonanza licensed first run motion pictures exclusively by bidding or negotiating against the individual

member of the split negotiating or bidding for each picture. Plaintiff does not claim this 1968 split arrangement had any effect upon it and in fact it did not. The split arrangement reduced the number of competitors against whom plaintiff was required to bid or negotiate for first-run motion pictures in the Las Vegas market.

16. In 1969 and 1970 all exhibitors of first-run motion pictures in the Las Vegas market bid and negotiated for first-run pictures on an exclusive basis. By late 1969 few road show pictures were being produced and Cinerama Theatre began competing for first-run pictures on an exclusive basis.

17. In 1970 ABC opened the ABC Parkway Theatre in the Las Vegas market, a walk-in theatre. ABC bid and negotiated for first-run product on an exclusive basis.

18. In 1971 NTC, Cragin (for the El Portal Theatre), Cinerama Theatre, ABC, National General and the plaintiff entered into and participated in a split of product arrangement for first-run motion pictures on an exclusive basis in the Las Vegas market. Plaintiff voluntarily withdrew from this arrangement in September or October 1971, and it terminated several months thereafter.

19. During the existence of the 1971 split of product arrangement, all of the members thereof exhibited first-run motion pictures on an exclusive basis. Subsequent to the termination of the split arrangement, the former members continued to play pictures on an

exclusive first-run basis. In 1973 Mann Theatres (a non-party) bought National General's theatres in the Las Vegas market. Mann too thereafter exhibited motion pictures on an exclusive first-run basis only in the Las Vegas market. Also in 1973, Plitt Theatres (a non-party) bought ABC's Parkway Theatre. Plitt thereafter exhibited films on an exclusive first-run basis only in the Las Vegas market.

20. There is no evidence of defendants agreeing among themselves or with anyone else not to exhibit motion pictures day and date with plaintiff in the Las Vegas market. Each of the defendants bid or negotiated for pictures on an exclusive first-run basis because they believed they would earn more money exhibiting motion pictures on that basis.

21. In 1966 Cragin built the Red Rock Theatre. The Red Rock Theatre originally failed to establish itself as a first-run motion picture theatre and thereafter played subsequent-run pictures. In 1971 the Red Rock became a four-plex theatre with the additions of Red Rock screens 2, 3 and 4. In 1972 it became a six-plex and in 1973 it became an eleven-plex theatre with the additional Red Rock screens 5, 6, 7, 8, 9, 10 and 11. The policy of these theatres has been to play exclusive first-run where such motion pictures were available and all the Red Rock Theatres have so exhibited pictures.

22. The Las Vegas Drive-In is presently a four-plex theatre. Screens 3 and 4 were added subsequent to the damage period of this lawsuit.

23. The evidence is that in 1966 plaintiff had 19 screens in various areas of the United States. Plaintiff now has 114 walk-in and drive-in screens. Many of plaintiff's walk-in theatres in other market areas maintain an exclusive policy. In the years immediately following the opening of the Las Vegas Drive-In in 1966, plaintiff built a number of walk-in theatres in Northern and Southern California and Nevada but did not build a walk-in theatre in the Las Vegas market.

24. Drive-in and walk-in theatres compete for patrons. Some patrons go only to walk-in and others go only to drive-in theatres. There is an overlap of patrons who go to either theatre, depending upon the picture playing.

25. Distributors decide to whom they will license their motion pictures on the basis of earning the most money in each market area.

26. During the complaint period only Paramount offered some motion pictures in the Las Vegas market on an either/or basis.[3] No distributor offered any of its motion pictures on a day and date basis only during the complaint period.

27. The exhibitors in Las Vegas making offers on motion pictures offered for exclusive first-run exhibition could not offer to license those pictures on a day and date basis consistent with the terms of the bid invitation. Thus, on the vast majority of pictures offered during the four-year complaint period, de-

[3]And perhaps one other unidentified distributor.

fendants were not able to license motion pictures for exhibition in the Las Vegas market on a day and date basis even if they chose to do so.

28. There is no evidence as to which motion pictures were offered by which distributor or distributors on an either/or basis during the complaint period.

29. There is no evidence from which it could be determined or even inferred plaintiff would have earned more money exhibiting motion pictures on day and date basis than it earned on the pictures it exhibited. Plaintiff was not deprived at any time of an opportunity to license first-run motion pictures on an exclusive basis. In fact it opened its Las Vegas Drive-In on January 4, 1966 with a first run film "DO NOT DISTURB" released by Warner Bros. During the four-year statutory period it filled approximately 40% of its theatre playtime with first-run motion pictures.

30. There is no evidence as to the percentage of first-run playtime in any of defendants' theatres in the Las Vegas market during the complaint period.

31. There is no evidence defendants or any of them entered into a combination, conspiracy or contract in restraint of trade in violation of Section 1 of the Sherman Act.

32. There is no evidence the actions of defendants or any of them constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

33. There is no evidence the actions of defendants or any of them had any injurious impact upon plaintiff in violation of Section 1 of the Sherman Act.

34. There is no evidence the actions of defendants or any of them damaged plaintiff in violation of Section 1 of the Sherman Act.

35. There is no evidence defendants or any of them attempted to monopolize trade and commerce or combined or conspired to do so in violation of Section 2 of the Sherman Act.

36. There is no evidence the actions of defendants or any of them had any injurious impact on plaintiff in violation of Section 2 of the Sherman Act.

37. There is no evidence the actions of defendants or any of them damaged plaintiff in violation of Section 2 of the Sherman Act.

38. There is no evidence defendants or any of them combined, conspired or agreed with distributors alleged as coconspirators or any of them to prevent and exclude plaintiff from exhibiting motion pictures first-run at plaintiff's theatres in the Las Vegas market.

39. There is no evidence defendants or any of them negotiated with distributors alleged to be coconspirators on a circuit basis rather than picture-by-picture, and theatre-by-theatre, and there is no evidence defendants or any of them used economic power to prevent day and date first-run exhibition in the Las Vegas market.

40. There is no evidence defendants or any of them combined, conspired or agreed with distributors alleged to be coconspirators or any of them to prevent and exclude plaintiff from exhibiting motion pictures

first-run at plaintiff's theatres in the Las Vegas market.

41. To the extent that any of the following conclusions of law in whole or in part constitute findings of fact, they are incorporated herein by this reference as though fully set forth herein.

CONCLUSIONS OF LAW

1. None of the defendants entered into a combination, contract or conspiracy in restraint of trade in violation of Section 1 of the Sherman Act.

2. The actions of defendants and each of them did not constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

3. The actions of defendants and each of them did not have any injurious impact upon plaintiff in violation of Section 1 of the Sherman Act.

4. The actions of defendants and each of them did not damage plaintiff in violation of Section 1 of the Sherman Act.

5. None of the defendants monopolized trade and commerce or combined or conspired to do so in violation of Section 2 of the Sherman Act.

6. The actions of defendants and each of them did not have injurious impact upon plaintiff in violation of Section 2 of the Sherman Act.

7. The actions of defendants and each of them did not damage plaintiff in violation of Section 2 of the Sherman Act.

8. To the extent any of the foregoing findings of fact constitute conclusions of law in whole or in part, they are incorporated herein by this reference as though fully set forth herein.

ORDER

A Directed Verdict shall be entered accordingly and defendants shall be awarded costs.

Dated: 8/14/75

/s/ Roger D. Foley
United States District Court Judge

Prepared and submitted by:

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Alian Albala
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A Professional Corporation

/s/ By Nathan Goldberg
Nathan Goldberg
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